- For Publication -

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	**CRIMINAL ACTION NO. 15-138-1**
v.	
JAMES DAVIS	

OPINION

After a twenty-five day trial, Defendant James Davis was found guilty of: (i) conspiracy to commit honest services fraud under 18 U.S.C. § 371; and, (ii) honest services fraud under 18 U.S.C. §§ 1343, 1346, and 1349. The Government alleged that he provided a stream of benefits, including campaign contributions and personal payments to the then-Sheriff of Philadelphia, John Green, in exchange for lucrative services contracts from the Philadelphia Sheriff's Office. Davis has moved for acquittal pursuant to Rule 29 of the Federal Rule of Criminal Procedure or, in the alternative, for a new trial pursuant to Rule 33 on both counts. For the reasons set forth below, Davis's motions shall be denied.

I. LEGAL STANDARD UNDER RULE 29[1]

"A judgment of acquittal is appropriate under Federal Rule of Criminal Procedure 29 if, after reviewing the record in a light most favorable to the prosecution, we determine that no rational jury could have found proof of guilt beyond a reasonable doubt." *United States v. Willis*, 844 F.3d 155, 164 n.21 (3d Cir. 2016). "The prosecution may bear this burden entirely through circumstantial evidence." *United States v. Bobb*, 471 F.3d 491, 494 (3d Cir. 2006). The evidence is reviewed "as a whole, not in isolation. . . ." *United States v. Caraballo-Rodriguez*,

[1] The analysis here and in the following sections principally addresses Davis's sufficiency challenge. A separate section will discuss his Rule 33 motion.

726 F.3d 418, 430 (3d Cir. 2013) (en banc) (quoting *United States v. Boria*, 592 F.3d 476, 480 (3d Cir. 2010)).

II. BACKGROUND

Davis is a Philadelphia businessman who owns Reach Communications Specialists, Inc. ("Reach") and RCS Searchers, Inc. ("RCS"). Davis's, co-defendant, John Green, was elected Sheriff of Philadelphia for the first time in 1988 and held the office until his retirement in December 2010. Since at least 2003, Reach was "the advertising agency of record for the Philadelphia Sheriff's Office," publishing notices of the Office's property foreclosure sales in various newspapers. RCS, on the other hand, conducted title searches and prepared deeds for distressed properties that would be sold at the Sheriff's sales.

i. Stream of Benefits

The crux of the Superseding Indictment was that Davis bribed Green with a "stream of benefits" in exchange for Reach and RCS receiving lucrative Sheriff's Office contracts, involving substantial and increasing amounts of money, from around 2002 to 2010. Indeed, a forensic investigator who examined Sheriff's Office financial records found that an "overwhelming percentage of the fees that the Sheriff was paying . . . went to or through RCS and Reach." At trial, the Government adduced evidence of a "stream of personal benefits" that encompassed a wide range of activity, such as Davis:

- selling Green a newly renovated home at a discounted rate;
- providing Green with free rent and utilities at that home before it was sold;
- retaining Green's wife as a subcontractor and paying her company $232,000 over the years;
- providing Green with a $258,151.21 interest-free loan to purchase a retirement home in Florida;

- making additional payments of at least $66,000 to Green, some of which was not repaid and none of which had an interest rate or a re-payment schedule; and
- making hidden and indirect payments of at least $65,100 towards Green's re-election campaigns.

ii. The 2010 Annual Campaign Finance Report Wire Transmission

For the honest services fraud count at issue, the Government asserted that Davis attempted to conceal the extent of his financial support for Green: Specifically, that in early 2011, Davis caused a wire transfer that furthered the bribery scheme – an interstate electronic filing of Green's 2010 Annual Campaign Finance Report that fraudulently understated the actual amount of financial assistance Davis provided during Green's re-election run in 2007.

Evidence adduced at trial showed that although Davis gave Green over $60,000 in 2007, Davis told a Sheriff's Office employee to underreport that number as $30,000. That falsified number was carried forward as an outstanding campaign debt in subsequently filed campaign finance reports, including the electronic version of the 2010 Annual Campaign Finance Report.

In her testimony, Barbara Deeley – a management-level employee at the Sheriff's Office who helped with Green's re-election campaign – provided details related to this false Annual Campaign Finance Report.[2] According to Deeley, when the re-election campaign was low on funds in early May 2007 and Deeley brought it to Green's attention, he replied, "Talk to Davis." After she discussed the matter with Davis, Davis caused $50,000 to be transferred into the campaign's bank account.[3] When Deeley asked Davis about reporting this sum on a handwritten version of the campaign finance reports, Davis told her not to "worry about it" and not to list the

[2] Deeley served as Chief of Staff, Chief Deputy, and Acting Sheriff at different points in time from 1995 to 2011.

[3] The $50,000 was funded by Davis's nephew, Darnell Lloyd. However, Lloyd himself did not directly contribute the $50,000 to Green's re-election campaign. Rather, Davis told Lloyd of a real estate investment opportunity that required a $50,000 payment. Lloyd then made that payment, assuming that it would be used to fund the real estate opportunity. Instead Davis paid it into the campaign.

number on the physical report. Months later, Davis contributed an additional $12,600 to Green's re-election campaign, and again told Deeley not to report it.[4] Instead, at Davis's behest, Deeley only recorded $30,000's worth of unpaid debt to Reach in the handwritten 2007 Annual Campaign Finance Report. In other words, Davis directed Deeley to misstate the amount of financial assistance that he actually provided to Green's re-election campaign on a formal document. Once the false campaign debt was listed on the 2007 Annual Campaign Finance Report it was re-listed on all subsequent reports.

Each of those reports, in turn, had to be submitted electronically to Philadelphia's Board of Ethics – a fact that Davis was aware of, according to Reach employee Yvonne Cornell, who helped prepare the electronic version of the reports. For example, in filing the January 2008 report, Cornell read Deeley's handwritten 2007 Annual Campaign Finance Report then carried over the false $30,000 debt to Reach into the electronic version of the 2008 report. Although Cornell did not recall electronically filing the 2010 Annual Campaign Finance Report, the parties agree that this form was electronically filed by interstate wire. Because Davis knew that the Board of Ethics required electronic filings, the Government contends that it was reasonably foreseeable that the fraudulent $30,000 debt that Davis initially told Deeley to write into the 2007 Annual Campaign Finance Report would carry over to the 2010 Annual Campaign Finance Report – the wire transmission supporting Davis's honest services fraud verdict.

Based on the above and other evidence presented at trial, the jury found Davis guilty of conspiracy to commit honest services fraud and substantive honest services fraud.

[4] According to Deeley, Davis did not directly contribute this amount into the campaign's bank account because "he did not want it to look like he was giving all of that money to the campaign. . . ." Instead, Deeley deposited the $12,600 after Davis wrote her a $12,600 check for renting her "summer condo." As Deeley testified, she did not rent Davis a summer home, nor did she even own one.

III. RULE 29 DISCUSSION

A. Honest Services Fraud

"To prove wire fraud, the Government must establish '(1) the defendant's knowing and willful participation in a scheme or artifice to defraud, (2) with the specific intent to defraud, and (3) the use of . . . interstate wire communications in furtherance of the scheme.'" *See United States v. Andrews*, 681 F.3d 509, 518 (3d Cir. 2012). The phrase "scheme or artifice to defraud" is defined to include "a scheme or artifice to deprive another of the intangible right of honest services." 18 U.S.C. § 1346; *Andrews*, 681 F.3d at 518. As interpreted by the Supreme Court, Section 1346 criminalizes only "fraudulent schemes to deprive another of honest services through bribes or kickbacks." *Id*. (quoting *Skilling v. United States*, 561 U.S. 358, 404 (2010)). Davis mainly advances two grounds in seeking acquittal, arguing that there was insufficient evidence of (i) a bribery scheme; and (ii) a knowing wire transmission in furtherance of that bribery scheme. Neither ground warrants acquittal for his honest services fraud verdict.

i. Bribery Scheme

If, as here, the Government's theory of bribery is based on a public official's receipt of campaign contributions, the contributions are illegal "only if the payments are made in return for an explicit promise or undertaking by the official to perform or not to perform an official act."[5] *McCormick v. United States*, 500 U.S. 257, 273 (1991). Davis contends that there is insufficient evidence in support of an "explicit" bribery scheme – in legal parlance, a "*quid pro quo*" – with Green, who was a public official at the relevant times of the Superseding Indictment. *See United*

[5] This Court has already found that *McCormick*'s requirement of an "explicit promise or undertaking" applies to honest services fraud. *See United States v. Davis*, 2018 U.S. Dist. LEXIS 22049, at *15 (E.D. Pa. 2018); *see also United States v. Siegelman*, 640 F.3d 1159, 1170 (11th Cir. 2011) ("While the Supreme Court has not yet considered whether the federal funds bribery, conspiracy or honest services maul fraud statutes require a similar 'explicit promise,' the Seventh Circuit Court of Appeals has observed that extortion and bribery are but 'different sides of the same coin.'") (citing *United States v. Allen*, 10 F.3d 405, 411 (7th Cir. 1993)).

States v. Sun-Diamond Growers of Cal., 526 U.S. 398, 404-05 (1999) ("[F]or bribery there must be a *quid quo pro* – a specific intent to give or receive something of value *in exchange* for any official act."); *United States v. Kemp*, 500 F.3d 257, 281 (3d Cir. 2007) (same).

Although the Supreme Court has not delineated the contours of what an "explicit" promise is and what it is not, Justice Kennedy, in a concurring opinion in *Evans v. United States*, opined that a *quid pro quo* need not be stated in "express terms, for otherwise the law's effect could be frustrated by knowing winks and nods." 504 U.S. 255, 274 (1992) (Kennedy, J., concurring). Thus, a *quid pro quo* can be based on inference: "The inducement from the official is criminal if it is express or if it is implied from his words and actions, so long as he intends it to be so and the payor so interprets it." *Id.* This formulation of a *quid pro quo* for bribery schemes has since been adopted by the Third Circuit. *United States v. Wright*, 665 F.3d 560, 569 (3d Cir. 2012); *see also United States v. Garrido*, 713 F.3d 985, 997 (9th Cir. 2013) ("Section 1346 honest services convictions on a bribery theory . . . require at least an implied *quid pro quo*.").

Viewed in the light most favorable to the Government, the evidence is sufficient to show that Davis participated in a *quid pro quo* and tried to conceal it through Green's 2010 Annual Campaign Finance Report. *See id.* ("Parties to a bribery scheme rarely reduce their intent to words, but the law does not require that.").

1. Benefits to Green

It is settled law in the Third Circuit that bribes may come in the form of a "stream of benefits." *United States v. Ciavarella*, 716 F.3d 705, 730 (3d Cir. 2013); *Wright*, 665 F.3d at 568 (quoting *United States v. Bryant*, 655 F.3d 232, 240-41 (3d Cir. 2011)); *Kemp*, 500 F.3d at 282. This form of bribery "does not require that each *quid*, or item of value, be linked to a specific *quo*, or official act." *Ciavarella*, 716 F.3d at 730 (quoting *Wright*, 665 F.3d at 568). In

other words, the Government was not required to peg every benefit that Davis gave to an official act by Green in determining whether Davis participated in a bribery scheme. Given that Davis, among other things, (a) sold Green a newly renovated home at a discounted rate; (b) provided Green with an interest-free loan of over $250,000 so that he could purchase a retirement home; and (c) gave several loans to Green that have not yet been repaid, a rational juror could conclude that Davis conferred a "stream of benefits" on Green to encourage Green to have the Sherriff's Office enter into contracts with Reach and RCS – in other words, that Davis bribed Green so that Reach and RCS could keep and grow its business with the Sheriff's Office.

Davis nevertheless contends that the Government's stream of benefits theory is inconsistent with *McCormick* insofar as the Government relies on Davis's campaign contributions for his conviction. As the Third Circuit has cautioned, "[c]ampaign contribution cases present special problems because persons who hope that their interests will receive favorable treatment from elected officials legitimately may make campaign contributions to those officials." *United States v. Bradley*, 173 F.3d 225, 231 n.1 (3d Cir. 1999) (citing *McCormick*, 500 U.S. at 272-73). Thus, according to Davis, because the Government failed to tether each campaign contribution to an official act by Green, Davis must be acquitted of honest services fraud.

But, even in the context of campaign contributions, the stream of benefits theory of bribery survives *McCormick*. As an initial matter, Davis cites no case law which holds that the stream of benefits theory is at odds with *McCormick*'s requirement of an "explicit promise" made by a public official. Although post-*McCormick* case law in the Third Circuit has not directly addressed whether campaign contributions can be properly regarded as a benefit under a stream of benefits theory, Supreme Court and Third Circuit precedent suggest that it can. In

Evans, for instance, the Supreme Court "permitted a jury to convict a state legislator who attempted to claim the payment he received was a campaign contribution." *United States v. Terry*, 707 F.3d 607, 613 (6th Cir. 2013) (discussing *Evans*, 504 U.S. at 257-59). And in *Kemp*, the Third Circuit, upholding the validity of a stream of benefits instruction, held that "[w]hile the form and number of gifts may vary, the gifts still constitute a bribe as long as the essential intent . . . exists." 500 F.3d at 282. Hence, an improper gift can masquerade in the "form" of a campaign contribution. *See id.* It follows, then, that if a single campaign contribution standing by itself can be considered a bribe, it remains a bribe when it is otherwise part of a stream of non-campaign related bribes.

To the extent Davis suggests that the jury mistakenly assumed that his campaign contributions were *ipso facto* a bribe because it was grouped together with other benefits shown at trial, the Court delivered jury instructions dispelling that notion.[6] And while Davis correctly maintains that he has a First Amendment right to make campaign contributions, that does not, under *McCormick*, give him a concomitant right to use those contributions to acquire lucrative contracts from the Sheriff's Office.[7] *See Terry*, 707 F.3d at 614 ("Whatever else *McCormick* may mean, it does not give an elected judge the First Amendment right to sell a case so long as the buyer has not picked out *which* case at the time of sale.").

What's more, other circuits have held that campaign contributions can constitute an

[6] As the Court explained, "with respect to campaign contributions, the solicitation or acceptance by an elected official of a campaign contribution does not, in itself, constitute a federal crime, even if the donor has business pending before the official, and even if the contribution is made shortly before or after the official acts favorable to the donor. Instead, with respect to campaign contributions, the Government must prove that the contributions were offered, made, or accepted in return for an explicit promise or undertaking by the official to perform or not to perform an official act. The agreement must be explicit, but there is no requirement that it be express."

[7] For this reason, Davis's contention that the jury's guilty verdict must be set aside because it may have been based on an impermissible ground – criminalizing his constitutional right to make campaign contributions – fails as well.

improper benefit when financial favors to a public official are at issue.[8] As the Sixth Circuit has explained, "[t]hat a bribe doubles as a campaign contribution does not by itself insulate it from scrutiny." *Id.* at 613. And, "[t]he agreement between the public official and the person offering the bribe need not spell out which payments control which particular official acts." *Id.* at 612. Instead, "it is sufficient if the public official understood that he or she was expected to exercise some influence on the payor's behalf as opportunities arose." *Id*. (quoting *United States v. Abbey*, 560 F.3d 513, 518 (6th Cir. 2009)); *see also United States v. Ganim*, 510 F.3d 134, 145 (2d Cir. 2007) (holding that benefits to public official need not be "directly linked to a particular act at the time of agreement," even when defendant argued that the gifts were received as a part of "legitimate lobbying activity"). In a Fifth Circuit case involving two state judges who "argued that the loan guarantees they received were made in the context of their electoral campaigns and thus required special protection," the court concluded that the payments were bribes. *Terry*, 707 F.3d at 613 (discussing *United States v. Whitfield*, 590 F.3d 325, 353 (5th Cir. 2009)). Indeed, as the Fifth Circuit observed, the "overwhelming weight of authority . . . supports the conclusion that the law does not require" the Government to identify a "particular case" that was influenced by a bribe. *Whitfield*, 590 F.3d at 353.

More to the point, the Ninth Circuit held that the "explicitness requirement" of *McCormick* does not require that a public official "specifically state[] that he will exchange official action for a contribution." *United States v. Carpenter*, 961 F.2d 824, 827 (9th Cir. 1992). "To read *McCormick* as imposing such a requirement would allow officials to escape liability . . . with winks and nods, even when the evidence as a whole proves that there has been a meeting of the minds to exchange official action for money." *Id.*

[8] In contrast to the Third Circuit, the other circuits do not refer to this theory of bribery as "stream of benefits."

In sum, the Government presented evidence showing the myriad financial benefits that Davis conferred upon Green in exchange for Reach and RCS's continued business with the Sheriff's Office. For bribery prosecutions, "[courts] rely on the good sense of jurors . . . to distinguish intent from knowledge or recklessness where the direct evidence is necessarily scanty." *Wright*, 665 F.3d at 569; *Terry*, 707 F.3d at 612 ("As most bribery agreements will be oral and informal, the question is one of inferences taken from what the participants say, mean and do, all matters that juries are fully equipped to assess."); *see also McDonnell v. United States*, 136 S. Ct. 2355, 2371 (2016) ("It is up to the jury, under the facts of the case, to determine whether the public official agreed to perform an 'official act' at the time of the alleged *quid pro quo*."). At bottom, there was sufficient evidence for a rational juror to find a bribery scheme beyond a reasonable doubt.

2. Green's Official Acts

On the other end, Davis benefitted from Green's "official acts." For purposes of bribery, an "official act" is "any decision or action on a 'question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official's official capacity, or in such official's place of trust or profit.'" *McDonnell*, 136 S. Ct. at 2367 (quoting 18 U.S.C. § 201(a)(3)). An official act requires two parts. First, "the Government must identify a 'question, matter, cause, suit, proceeding or controversy' that 'may at any time be pending' or 'may by law be brought' before a public official," which involves a "formal exercise of governmental power that is similar in nature to a lawsuit before a court, a determination before an agency, or a hearing before a committee." *Id.* at 2369; *United States v. Fattah*, -- F.3d --, 2018 WL 3764543, at *25 (3d Cir. 2018). Second, "the Government must prove that the public official made a decision or took an action 'on' that

question, matter, cause, suit, proceeding, or controversy, or agreed to do so." *McDonnell*, 136 S. Ct. at 2368; *Fattah*, 2018 WL 3764543, at *25. Green's official act of awarding contracts to Davis's companies meets both requirements.

Awarding Davis's companies lucrative contracts for advertising the Sheriff's sales was a determination made by a municipal agency.[9] Supreme Court and Third Circuit precedent confirm this conclusion. *See McDonnell*, 136 S. Ct. at 2374 (holding that an agency's allocation of grant money by a state commission qualifies as an "official act"); *United States v. Repak*, 852 F.3d 230, 253 (3d Cir. 2017) (holding that a decision by the Johnstown Redevelopment Authority, a governmental agency, to award money to contractors was "undoubtedly" a "formal exercise of governmental power"); *see also United States v. Boyland*, 862 F.3d 279, 291 (2d Cir. 2017), *cert. denied*, 138 S. Ct. 938 (2018) (holding that "City or State approvals" necessary to award demolition contracts "require the formal exercise of governmental power."); *United States v. Pomrenke*, 198 F. Supp.3d 648, 701 (W.D. Va. 2016) (holding that "[t]he award of a contract by a public entity is 'a formal exercise of governmental power,' similar in nature to 'a lawsuit, hearing, or administrative determination.'") (quoting *McDonnell*, 136 S. Ct. at 2368).

And awarding these contracts was a matter "pending" before Green in his capacity as a public official. *See McDonell*, 136 S. Ct. at 2369 (holding that the word "pending" "suggest[s] something that is relatively circumscribed – the kind of thing that can be put on an agenda, tracked for progress, and then checked off as complete."); *Repak*, 852 F.3d at 253 (concluding that the award of contracts by the redevelopment authority is something that is "pending" under

[9] Though Davis argues that Green's decision to run for re-election is not an "official act" under *McDonnell*, this misses the mark; the exercise of governmental power, as alleged in the Superseding Indictment and proven at trial, was awarding contracts to Davis's companies for his advertising services.

McDonnell).[10]

Green also made a "decision" on the matter of awarding contracts to Reach and RCS for Sheriff's sales. *See McDonnell*, 136 S. Ct. at 2368. As two longtime Sheriff's office employees testified, Green decided the vendors to use for the foreclosure sales, the amount of work they could perform, and the fees they could charge. Indeed, Green's blessing was needed for all vendors who wished to do business with the Sheriff's Office. Green exercised that decision-making power by making Reach and RCS the Sheriff's Office's "primary vendors" which, as such, received an "overwhelming percentage" of the fees paid out for the Sheriff's sales.

ii. Knowing Transmission of the Wire Communication

Davis alternatively contends that there is insufficient evidence to show that he "knowingly caused" an interstate wire transmission.[11] *See Andrews*, 681 F.3d at 529. Specifically, Davis argues that "the trial record contains no evidence indicating who filed" the 2010 Annual Campaign Finance Report. According to Davis, the Reach employee who completed this report, Cornell, was unable to recall if she had prepared or filed any campaign finance report in 2010.

Honest services fraud based on a wire transmission "does not require that the defendant himself sent the communication or that he intended that interstate wire communications would be used." *See id*. Instead, it is sufficient if Davis here "knowingly caused" the use of the wire communication. *Id*. (citing *United States v. Bentz*, 21 F.3d 37, 40 (3d Cir. 1994)). If he "does an act with the knowledge" that the use of the wire communication will "follow in the ordinary

[10] In contrast, "matters described at a high level of generality – for example, '[e]conomic development,' 'justice,' and 'national security' – are not sufficiently 'focused and concrete.'" *Fattah*, 2018 WL 3764543, at *25 (quoting *McDonnell*, 136 S. Ct. at 2369).

[11] The parties stipulated that the wire transmission crossed state lines, going from Texas to Pennsylvania.

course of business, or where such use can reasonably be foreseen, even though not actually intended," then Davis caused the wire to be used. *See id*. (quoting *Pereira v. United States*, 347 U.S. 1, 8-9 (1954)).

A rational juror could find that Davis's wire transmission of the 2010 Annual Campaign Finance Report was reasonably foreseeable based on the following pieces of testimony presented during trial:

- Davis directed Deeley to understate the amount of actual debt owed to Reach in hard-copy versions of the 2007 Annual Campaign Finance Report;
- Davis asked Cornell, who relied on Deeley's handwritten 2007 Annual Campaign Finance Report, to complete the electronic versions;
- Davis generally knew that the Annual Campaign Finance Reports, including the one from 2010, had to be submitted electronically to Philadelphia's Board of Ethics;
- Cornell previously filed an electronic Campaign Finance Filing Form with Philadelphia's Department of Records in 2008 and included the false $30,000 debt that was carried over from the handwritten 2007 Annual Campaign Finance Report; and
- Somebody filed an electronic 2010 Annual Campaign Finance Report including the false $30,000 debt.

On these facts, Government satisfied the causation requirement for honest services wire fraud. Although Davis notes that Cornell did not recall preparing or filing an electronic version of the 2010 Annual Campaign Finance Report, this is beside the point because the identity of the filer is not at issue. Rather, the crucial point is that, given the facts above, it was reasonably foreseeable that Davis's fraud – the understated debt amount he told Deeley to put into the handwritten Annual Campaign Finance Report, which was subsequently entered into the electronic version by one of his own employees – would be transmitted via wire. *See Andrews*, 681 F.3d at 529. In sum, the record supports the jury's verdict for honest services fraud.

B. Conspiracy

Conspiracy requires the following three elements: "(1) the existence of an agreement to achieve an unlawful objective; (2) the defendant's knowing and voluntary participation in the conspiracy; and (3) the commission of an overt act in furtherance of the conspiracy." *United States v. Rigas*, 605 F.3d 194, 206 (3d Cir. 2010) (en banc) (internal quotation marks omitted). The jury found Davis guilty of conspiracy to deprive Philadelphia and its citizens of their intangible right to the honest services of Green as Sheriff. Davis, however, contends that: (i) the conspiracy count fails under the statute of limitations and (ii) there was insufficient evidence of a conspiratorial agreement. Neither reason is persuasive.

i. Statute of Limitations

Davis asserts that the statute of limitations bars the conspiracy count because the Government adduced no evidence of a timely overt act. The statute of limitations for conspiracy is five years after an indictment is returned by a grand jury and filed. 18 U.S.C. 3282(a); *United States v. Oliva*, 46 F.3d 320, 324 (3d Cir. 1995). Given the filing date of the Superseding Indictment, the Government was required to prove an overt act in furtherance of the conspiracy that post-dated December 15, 2010. *See United States v. Davis*, 2018 U.S. Dist. LEXIS 22049, at *6 (E.D. Pa. 2018).

To determine if there is a timely overt act, the "crucial question" at the outset is the "scope of the conspiratorial agreement." *United States v. Bornman*, 559 F.3d 150, 153 (3d Cir. 2009) (quoting *Grunewald v. United States*, 353 U.S. 391, 396 (1957)). That is because the scope "determines both the duration, and whether the act relied on as an overt act may properly be regarded as in furtherance of the conspiracy." *Id.* As alleged in the Superseding Indictment and argued by the Government at trial, the scope of this conspiracy was a *quid pro quo*: in exchange for a stream of benefits, Green awarded Davis lucrative contracts. Thus, the inquiry is

whether there was sufficient evidence of an overt act which occurred after December 15, 2010 that falls within the scope of the *quid pro quo* – the stream of benefits that Davis conferred upon Green for the Reach and RCS contracts.

The Government produced evidence of numerous overt acts that occurred after December 15, 2010 related to the *quid pro quo*.[12] These include:

- The Sheriff's Office's two separate payments to Reach in December 29, 2010 for advertising services in the amounts of $28,803.37 and $34,356.05;[13]
- Davis's wire transmission of $258,151.32 from his personal bank account to Green's title agency on December 20, 2010, and Green's repayment of that amount in March 2011 without any interest;
- The 2010 Annual Campaign Finance Report transmitted in January 2011 by wire, falsely reporting that Green's campaign owed $30,000 to Reach; and
- Davis's $10,000 loan to Green in September 2011 that was never repaid.[14]

Davis's reply briefing does not otherwise explain how the $258,151.32 interest-free loan by Davis, its repayment by Green, or the fraudulent 2010 Annual Campaign Finance Report wire falls outside the scope of the *quid pro quo*.

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[12] Not all overt acts alleged in the Superseding Indictment will be addressed because "the government is not required either to prove all the overt acts to a conspiracy to a conspiracy or all the facts supporting the overt act." *See United States v. Kapp*, 781 F.2d 1008, 1012 (3d Cir. 1986). Rather, "[i]t is sufficient that the government prove a single overt act in furtherance of the conspiracy." *Id.*

[13] Davis argues that the two checks cannot be overt acts for the conspiracy count because the jury acquitted him of two honest services fraud counts based on these payments. This argument fails. In evaluating sufficiency challenges to convictions, the "review should be independent of the jury's determination that evidence on another count was insufficient." *United States v. Powell*, 469 U.S. 57, 67 (1984); *see also United States v. Salahuddin*, 765 F.3d 329, 349 (3d Cir. 2014) ("[T]he jury's acquittal on the attempt count is irrelevant to our review of the sufficiency of the evidence on the conspiracy count."). Thus, the jury's decision to acquit Davis of two honest services fraud counts has no bearing on the sufficiency of evidence for his conspiracy count.

[14] Davis argues that the $10,000 loan cannot be an overt act because it was made nine months after Green retired from the Sheriff's Office. But that argument was already addressed and rejected in Davis's motion to dismiss. *See Davis*, 2018 U.S. Dist. LEXIS 22049, at *10 (noting that the receipt of expected profits in an economically motivate conspiracy is an overt act) (citing *United States v. Vasquez-Uribe*, 426 F. App'x 131, 134 (3d Cir. 2011)); *see also id.* n.3 (collecting cases from different circuits holding the same). A rational juror could conclude that the $10,000 unpaid loan was a kickback from Davis to Green for awarding contracts to Reach and RCS.

ii. Agreement

That there was an agreement, in which Davis was a party, to defraud Philadelphia and its citizens of Green's honest services is supported by the evidence. Courts must give "close scrutiny" to sufficiency of the evidence challenges to conspiracy convictions because "slight evidence" of a defendant's connection to a conspiracy will not do. *United States v. Brodie*, 403 F.3d 123, 134 (3d Cir. 2005). A conspiracy conviction may, however, be established entirely by circumstantial evidence. *Id.*; *United States v. Smith*, 293 F.3d 473, 477 (3d Cir. 2002) ("The existence of a conspiracy can be inferred from evidence of related facts and circumstances from which it appears as a reasonable and logical inference, that the activities of the participants . . . could not have been carried on except as the result of a preconceived scheme or common understanding.") (internal quotation marks omitted). This was the case here.

Based on the (a) various benefits Davis conferred upon Green that are discussed above and (b) the business that Reach and RCS enjoyed at the Sheriff's Office, a rational juror could conclude that Davis and Green had a "preconceived scheme or common understanding" of the *quid pro quo* that deprived Philadelphia and its citizens of Green's honest services. *See id.* Thus, the jury's verdict for conspiracy stands.

IV. RULE 33 DISCUSSION

Rule 33 of the Federal Rules of Criminal Procedure provides that "the court may vacate any judgment and grant a new trial if the interest of justice so requires." "A district court can order a new trial on the ground that the jury's verdict is contrary to the weight of the evidence only if it 'believes that there is a serious danger that a miscarriage of justice has occurred – that is, that an innocent person has been convicted.'" *United States v. Johnson*, 302 F.3d 139, 150 (3d Cir. 2002) (quoting *United States v. Santos*, 20 F.3d 280, 285 (7th Cir. 1994)) (internal quotation marks omitted). In evaluating a Rule 33 motion, the court "does not view the evidence

favorably to the Government, but instead exercises its own judgment in assessing the Government's case." *Id.*

Exercising its own judgment, the Court concludes that the "interest of justice" does not require a new trial or acquittal of the guilty verdicts. Fed. R. Crim. P. 33. Besides reiterating his sufficiency challenge and re-incorporating objections made during trial, Davis offers no other argument of how a "miscarriage of justice has occurred." *See Johnson*, 302 F.3d at 150. The jury's verdicts were otherwise consistent with the weight of the evidence.

An order follows.

BY THE COURT:

/S/WENDY BEETLESTONE, J.

Date: September 12, 2018

WENDY BEETLESTONE, J.